In the Texas Court of Criminal Appeals

CRAIG DOYAL, CHARLIE RILEY, AND MARC DAVENPORT,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

From the Court of Appeals for the Ninth Judicial District of Texas at Beaumont,
Case Nos. 09-17-00123-CR, 09-17-00124-CR & 09-17-00125-CR

BRIEF FOR THE OFFICE OF THE ATTORNEY GENERAL AS AMICUS CURIAE

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Identity of Parties and Counsel

The identity of the parties and their counsel are correctly identified in the parties' briefs. Amicus curiae the Texas Office of the Attorney General is represented by the counsel listed on the cover of this brief.

TABLE OF CONTENTS

Index of Authorities

Page(s)

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

Interest of Amicus Curiae

The Texas Office of the Attorney General defends Texas statutes that are challenged under the Constitution of the United States. By requiring parties to notify the Office of the Attorney General of an action challenging the constitutionality of a state statute when the attorney general is not a party to or counsel involved in the litigation, Texas Gov't Code § 402.010, the Legislature has explicitly recognized this interest. Moreover, the Office of the Attorney General has a specific and heightened interest in this litigation because the Texas Open Meetings Act is a predominately civil law that is vital to the open functioning of all levels of government in Texas.

No fee has been paid for the preparation of this brief.

Introduction

The Texas Open Meetings Act ("TOMA") is an open-government statute that both ensures Texas citizens have the necessary information to hold their elected officials accountable and prevents government fraud and corruption. It promises Texans that "every regular, special, or called meeting of a governmental body shall be open to the public." Tex. Gov't Code § 551.002. This would be an empty promise, however, if a quorum could simply convene behind closed doors to discuss and potentially decide important policy issues. The Legislature therefore made it a misdemeanor for public officials to engage in secret deliberations with a quorum of a government body, whether those deliberations take place all at once, *id.* § 551.144, or through multiple successive gatherings, *id.* § 551.143.

Defendants here contend that section 551.143 is facially unconstitutional because it violates the First Amendment and is vague. But these are very odd arguments. "[T]he exercise of lawmaking power in the United States has traditionally been public," and no precedent supports a First Amendment "right to legislate without public disclosure." *Doe v. Reed*, 561 U.S. 186, 222 (2010) (Scalia, J., concurring). Yet that is all section 551.143 requires: disclosure. It does *not* restrict, suppress, or prohibit speech. Nor does it alter or limit the content of any speaker's message. It instead expands the information available to Texans about public affairs. Ironically, then, Defendants ask this Court to strike down in its entirety a provision that furthers First Amendment values.

Defendants' vagueness argument is equally odd because it is more than clear what section 551.143 prohibits as a whole. And in our judicial system, questions about

the precise bounds of a statute do not render that statute unconstitutionally vague; rather, those questions are answered case-by-case as they arise. Section 551.143 is no exception.

Standard of Review

"Whether a statute is facially constitutional is a question of law that [appellate courts] review *de novo*." *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013) (per curiam). This is because a "facial attack upon a penal statute is *solely and entirely* a legal question." *Karenev v. State*, 281 S.W.3d 428, 435 (Tex. Crim. App. 2009) (Cochran, J., concurring) (emphasis added) (citing 43A George E. Dix & Robert O. Dawson, *Texas Practice: Criminal Practice and Procedure* § 43.444, at 672 (2d ed. 2001) ("Purely 'legal question[s]' are always reviewed *de novo* . . . on appeal. Appellate courts have no authority to in any way defer to the trial court's resolution of them.")). There are no factual issues to resolve. Accordingly, despite the district court's decision to hold hearings during which witnesses opined that section 551.143 is unconstitutional, that testimony was effectively legal argument and should be treated as such. It is entitled to no deference from this Court, which must resolve all issues *de novo*.

Summary of the Argument

Section 551.143 makes it a misdemeanor for members of a governing body to knowingly conspire to circumvent TOMA's disclosure requirements by deliberating public issues with a quorum of that body through a series of meetings, none of which by itself has a quorum. As *Citizens United* confirmed, disclosure laws such as this

promote First Amendment values, "do not prevent anyone from speaking," and are constitutionally valid. *Citizens United v. Federal Elections Comm'n*, 558 U.S. 310, 366 (2010). They are upheld so long as there is "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 366-67 (internal quotation marks omitted).

Section 551.143 easily satisfies this standard. "In a society 'in which the citizenry is the final judge of the proper conduct of public business,' openness in the democratic process is of 'critical importance.'" *Doe*, 561 U.S. at 213 (Sotomayor, J., concurring) (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975)). Open meetings promote accountability, prevent corruption, and ensure that officials with minority views are not shut out by the majority. By enforcing open meetings, section 551.143 advances these interests, and is constitutional. Indeed, it is telling that Defendants do not cite a single case striking down an open meetings provision.

In any event, section 551.143 is subject to intermediate scrutiny because it is a content-neutral provision aimed at the "secondary effects" of hiding information from the public. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). It does not concern what is said, but only whether it is said in private, away from voters who need that information to hold their elected officials accountable. And even if strict scrutiny applied—and it does not—section 551.143 would still be constitutional because it is narrowly tailored to promote Texas's compelling interest in good governance.

Section 551.143 is also not unconstitutionally overbroad. Far from being overbroad, it applies only to those who *knowingly* seek to circumvent TOMA's disclosure

requirements. Nor is it unconstitutionally vague. As with any statute, questions of interpretation may exist at the margins. But that is irrelevant. What matters is whether it is clear what the statute prohibits at its core. And section 551.143 clearly prohibits persons from knowingly conspiring to circumvent TOMA's disclosure requirements by secretly deliberating with a quorum of a governmental body through a series of discussions.

ARGUMENT

I. The Texas Open Meetings Act Enforces Disclosure Requirements by Punishing Officials Who Knowingly Meet in a Secret "Walking Quorum."

Open-meetings laws are ubiquitous. Every State, as well as the federal government, has enacted an open-meetings law. *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.*, 332 N.W.2d 1, 5, 7 (Minn. 1983) (en banc). And many of these laws have existed for over 50 years. *See* Ann Taylor Schwing, *Open Meetings Laws*, § 1.1 (2d ed. 2000). They require covered governmental bodies to conduct certain meetings in the open, and they generally apply when a *quorum* of members has gathered to discuss public business within their jurisdiction. *See, e.g.*, Cal. Gov't Code §§ 11120 *et seq.*; Mich. Comp. Laws §§ 15.261 *et seq.*; *see also* Fla. Stat. Ann. §§ 286.011-.012 (applying absent a quorum).

Of course, courts and legislatures across the country are not "so naive as to be blind to the fact that those inclined to violate [open meeting laws] could do so using the quorum requirement as a shield." *Colombo v. Buford*, 935 S.W.2d 690, 699 (Mo. Ct. App. 1996). For that reason, many states interpret their open meetings laws to

prohibit so-called "walking quorums," where officials "circumvent the requirements of the statute by setting up back-to-back-meetings of less than a majority of [the body's] members, with the same topics of public business discussed at each." *State ex rel. Cincinnati Post v. Cincinnati*, 668 N.E.2d 903, 906 (Ohio 1996) (interpreting the "quorum" requirement to include walking quorums); *see also*, *e.g.*, *Stockton Newspapers, Inc. v. Members of Redevelopment Agency of City of Stockton*, 171 Cal. App. 3d 95, 102-03 (Cal. Ct. App. 1985); *Harris v. City of Fort Smith*, 158 S.W.3d 733, 738 (Ark. Ct. App. 2004).

Texas is no different. TOMA requires, with certain exceptions not applicable here, that "every regular, special, or called meeting of a governmental body shall be open to the public." Tex. Gov't Code § 551.002. To enforce this requirement, TOMA imposes penalties on those who knowingly circumvent it. Section 551.144 forbids a member of a governmental body to knowingly organize or participate in private deliberations of official business with a physical quorum of the governmental body. And section 551.143 picks up where section 551.144 leaves off. It prohibits walking quorums by imposing penalties on officials who seek to circumvent disclosure requirements (which apply when there is a quorum) by knowingly gathering and discussing public issues in numbers that do not physically constitute a quorum at any one time, but ultimately amount to a discussion with a full quorum. It reads:

> A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

Id. § 551.143(a).

Defendants argue that meeting in numbers less than a quorum for the purpose of secret deliberations is inherently a "contradiction" because "deliberations" require a quorum.[1] Doyal Br. 43-44 ("And if it takes a quorum to deliberate, how can less than a quorum deliberate?"). Not so. "Deliberation" occurs whenever officials *functionally* meet as a quorum to discuss public issues, even if there is no one meeting at which a quorum is physically present. To hold otherwise would impose a limit on TOMA's definition of "quorum" that has no textual basis. *See* Tex. Gov't Code § 551.001(6) (defining "quorum" as a majority of a government body); Tex. Att'y Gen. GA-0326 at 3 (2005) (TOMA "does not require that governmental body members be in each other's physical presence to constitute a quorum"). Accordingly, section 551.143 plainly prohibits members from circumventing their disclosure requirements by gathering in less than a physical quorum for the purpose of, over time, functionally meeting as a quorum—*i.e.* a secret walking quorum.[2]

This is also true despite the fact that "meeting" is statutorily defined to require a quorum.[3] The statutory definition of "meeting" does not apply to section 551.143 because TOMA defines the word as a noun, whereas section 551.143 "employs [it] as a verb." Tex. Att'y Gen. GA-0326 at 3; *see also Nguyen v. State*, 977 S.W.2d 450,

[1] Tex. Gov't Code § 551.001(2) (a "deliberation" is a "verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person").

[2] Defendants' argument that "other sections of TOMA sufficiently ensure that the public is part of the government decision-making process," Doyal Br. 2, misses this point. Without section 551.143, there would be a loophole that allows officials to evade those other sections.

[3] Tex. Gov't Code § 551.001(4)(A) (a "meeting" is "a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person").

454 n.5 (Tex. App.—Austin 1998) ("It seems to us obvious that 'carrying-on' (the noun) and 'carrying on' (the verb) are not interchangeable terms."), *aff'd*, 1 S.W.3d 694 (Tex. Crim. App. 1999). And even if it did, the Legislature plainly intended to modify it by explicitly prohibiting meetings "in numbers less than a quorum." *See* Tex. Gov't Code § 311.026(b) ("special or local provision prevails as an exception to the general provision").

II. Section 551.143 is Consistent with the First Amendment.

Because Defendants' First Amendment challenge is facial, they prevail only if they prove that "a substantial number of [section 551.143's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation and internal quotation marks omitted). They cannot do so. Section 551.143 easily satisfies "exacting scrutiny" as a disclosure provision—or, in the alternative, intermediate scrutiny as a content-neutral provision.

A. Section 551.143 is a Disclosure Statute that Easily Satisfies "Exacting Scrutiny."

1. Section 551.143 is a disclosure provision subject to exacting scrutiny because it does not prevent officials from speaking, but requires only that their speech be public.

Citizens United crystalized a sharp analytical divide between two distinct types of laws. On one side of this divide are laws that "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 558 U.S. at 339 (internal quotation marks omitted). These laws effectively ban speech and are subject to strict scrutiny. On the other side are laws that merely require disclosure, and thus "may burden the ability

to speak, but . . . do not prevent anyone from speaking." *Id.* at 366 (internal quotation marks omitted). These laws serve a speech enhancing function and are subject to "exacting scrutiny"—a lower form of scrutiny. *Id.*

Applying this framework, *Citizens United* held that a provision of the Bipartisan Campaign Reform Act ("BCRA") prohibiting corporations from expressly advocating the election or defeat of political candidates was an "outright" ban on speech. *Id.* at 337. It applied strict scrutiny and invalidated that provision. *Id.* at 340, 372. By contrast, the Court applied exacting scrutiny and upheld BCRA provisions imposing disclosure and disclaimer requirements on televised electioneering communications because those provisions did not prevent speech. *Id.* at 366-67.

Likewise, the Court in *Doe* upheld a provision of the Washington Public Records Act authorizing private parties to obtain the names and addresses of those who sign a petition to place a referendum on the state election ballot. The Court applied exacting scrutiny, explaining that the provision at issue was "not a prohibition on speech, but instead a *disclosure* requirement." *Doe*, 561 U.S. at 196.

Following these binding precedents, the Fifth Circuit held that TOMA section 551.144 is a disclosure statute subject to exacting scrutiny.[4] *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012). The court reasoned that although TOMA "burdens private political speech among a quorum of a governing body," "it does so in the same way that the BCRA's disclosure requirement burdened anonymous political speech in political advertisements." *Id.* at 463. "Neither statute aims to suppress the

[4] This was an alternative holding. *Asgeirsson*'s primary holding was that section 551.144 is a valid "content-neutral time, place, or manner restriction." 696 F.3d at 464.

underlying ideas or messages," and instead "arguably magnif[ies] the ideas and messages by requiring their disclosure." *Id.*

So too for section 551.143. As with BCRA in *Citizens United*, the open records law in *Doe*, and section 551.144 in *Asgeirsson*, section 551.143 neither prohibits anyone from speaking nor alters the content of any speaker's message. It enforces a disclosure requirement. In this way, section 551.143 is the antithesis of laws prohibiting speech and subject to strict scrutiny. It *expands* the audience receiving elected officials' messages and *enhances* the amount and quality of discourse in Texas public affairs. It is thus subject to exacting—not strict—scrutiny.

That section 551.143 punishes nondisclosure is irrelevant. "To enforce a disclosure requirement of certain speech, the government must have the ability to punish its nondisclosure. If there were no punishment for nondisclosure, the speaker would have no incentive to disclose until the enforcer of the statute prosecuted him or obtained an injunction." *Asgeirsson*, 696 F.3d at 463. And that is precisely what section 551.143 does. It incentivizes disclosure by making it a misdemeanor to knowingly and secretly deliberate with a walking quorum in order to evade TOMA's disclosure requirements.

Defendants argue that section 551.143 is distinguishable from the provision at issue in *Citizens United* because section 551.143 requires speech to be disclosed when it occurs and makes the failure to disclose an immediate violation. Doyal Br. 11-13 (stating that disclosure statutes "are those that require giving notice of a *past* event (emphasis added)). But they misread the facts of *Citizens United*. The disclosure provision upheld there required *contemporaneous* disclosure, not simply disclosure of

past speech. *Citizens United*, 558 U.S. at 366 (upholding law requiring "televised electioneering communications" to "*include* a disclaimer that _____ is responsible for the content of this advertising." (emphasis added) (internal quotation marks omitted)). And that command "was violated as soon as a political advertisement was televised without the required disclaimer," *Asgeirsson*, 696 F.3d at 464, regardless whether the speech was later disclosed.[5] Section 551.143 is plainly analogous to the disclosure law upheld in *Citizens United*. In any event, Defendants' purported distinction has no bearing on the dispositive question: whether the law prohibits speech or requires its disclosure.

2. Section 551.143 satisfies exacting scrutiny.

Exacting scrutiny requires a "substantial relation between" a challenged law and a "sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-67 (internal quotation marks omitted). Section 551.143 easily satisfies this standard. It is substantially related to at least three types of compelling governmental interests, even though one important governmental interest would suffice.

a. Section 551.143 advances Texas's compelling interest in ensuring that elected officials are accountable to their constituents and that there is transparency in the actions of governmental bodies. As the Supreme Court observed in *Citizens United*, laws that require "disclosure permit[] citizens . . . to react to the speech . . . in a proper way. This transparency enables the electorate to make informed decisions

[5] Even before *Citizens United*, the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), upheld a disclosure provision under exacting scrutiny despite there being "no indication that violations of the disclosure requirements were curable by later disclosure." *Asgeirsson*, 696 F.3d at 464.

and give proper weight to different speakers and messages." *Id.* at 371. And the Court reaffirmed the importance of these interests in *Doe* when it recognized Washington State's interest in "fostering government transparency and accountability." *Doe*, 561 U.S. at 197. Section 551.143 advances these interests by ensuring that Texas citizens have access to the deliberations and decision-making of the public officials whose decisions will affect their families, neighborhoods, businesses, and communities.

b. Subsection 551.143 also advances Texas's interest in "root[ing] out fraud" and corruption—as well as the appearance of fraud and corruption—in government. *Id.* The Supreme Court of the United States has called this a "particularly strong" interest because fraud "drives honest citizens out of the democratic process and breeds distrust of our government." *Id.* In fact, it is for this very reason that courts have invoked the First Amendment as a sword to require public access and openness in a variety of governmental proceedings. *See, e.g.*, *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980) (recognizing First Amendment right for the public and the press to attend criminal trials). Because "[p]ublic disclosure . . . promotes transparency and accountability . . . to an extent other measures cannot," *Doe*, 561 U.S. at 199, section 551.143 is more than substantially related to Texas's interest in preventing fraud and corruption.

c. Finally, section 551.143 advances the interests of public officials in two distinct but related ways. First, it provides credibility to officials by demonstrating that public deliberations are in fact *real*, and not merely a reenactment of prior secret discussions. Only with provisions such as section 551.143 can they convince some Texas

citizens that they have not engaged in elaborate schemes—such as deliberating in a walking quorum—to circumvent general disclosure requirements. Second, it gives public officials with minority views assurance that the majority is not deliberating public business in their absence.

Each of these compelling state interests is alone sufficient to satisfy exact scrutiny. Combined, they leave no doubt that section 551.143 is entirely consistent with the First Amendment.

B. As a Content-Neutral Provision, Section 551.143 Also Survives Intermediate Scrutiny.

Even if section 551.143 were not a disclosure provision subject to exacting scrutiny, it is a content-neutral provision subject to intermediate scrutiny because it does not aim at the suppression of free speech but at the "secondary effects" of secret governmental workings. *See Renton*, 475 U.S. at 47. In *Renton*, the Supreme Court of the United States upheld a law that treated "theaters that specialize in adult films differently from other kinds of theaters," *id.*, because even though that law applied only to certain speech content, it was justified without reference to that content. Specifically, it was justified by the desire to prevent adverse effects such as crime, lowered property values, and deterioration of residential neighborhoods. *Id.*; *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (law prohibiting standing near abortion facilities was content-neutral because it targeted secondary effects).

The same is true for section 551.143. Just as "[t]he content of the films being shown inside the theaters [in *Renton*] was irrelevant and was not the target of the

regulation," *Boos v. Barry*, 485 U.S. 312, 320 (1988), so too the content of the deliberations in secret walking quorums is irrelevant and not the target of section 551.143. What matters is not what officials say in private deliberations, but the negative consequences of it being said in private.[6]

And for the same reasons that section 551.143 satisfies exacting scrutiny, it also satisfies intermediate scrutiny, which requires only that the law be "narrowly tailored to serve a significant governmental interest." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 456 (2002). "[T]he requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (citation and internal quotation marks omitted). It can hardly be argued that a law prohibiting the knowing circumvention of a disclosure requirement does not promote the interests of disclosure, especially since courts must "defer" to reasonable determinations that a particular policy will serve the stated interest. *Id.* at 800.

C. Section 551.143 Survives Even Strict Scrutiny.

Section 551.143 is not subject to strict scrutiny, but it would survive such review if it were. The State's interests in ensuring officials are held accountable to voters, preventing the existence and appearance of fraud and corruption, and preventing minority exclusion are all compelling. Defendants disagree, citing the fact that the

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[6] *Renton* remains good-law after *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), as *Renton* and other secondary effects cases are not even mentioned in *Reed*'s majority opinion, and the Court does not "normally overturn, or so dramatically limit, earlier authority *sub silentio*," *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

Texas Legislature sometimes exempts itself from TOMA. *See, e.g.*, Doyal Br. at 29. But there is no requirement that a State advance a compelling interest in every possible circumstance. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) (recognizing that a government body, "in its discretion and expertise, may choose to pursue" a "compelling interest"). A compelling interest does not deprive states of policy discretion. And Defendants' argument that there is no compelling interest in abridging free speech rights in the name of transparency (Doyal Br. at 27-29), misses the point: transparency does not prevent anyone from speaking.

Section 551.143 is also narrowly tailored. Section 551.143 requires members of a government body to refrain only from *knowingly* conspiring to circumvent disclosure requirements by deliberating through a walking quorum. Tex. Gov't Code § 551.143(a). If an official does not know he is participating in a walking quorum, he is not liable, so the doomsday scenarios Defendants concoct have no basis in reality. *See* Doyal Br. 7 (discussing blog and house party hypotheticals). Moreover, other states impose civil penalties for the very actions covered by section 551.143. *See supra* at 5. Texas's decision to make the same prohibition criminal in nature does not destroy narrow tailoring, as narrow tailoring does not require a cookie-cutter, one-size-fits-all approach to consequences for nondisclosure. Indeed, requiring all states to impose the same consequences for nondisclosure through the narrow tailoring requirement would be anathema to our federal system.

It also makes no sense for Defendants to argue that section 551.143 is not narrowly tailored. Because section 551.143 applies *only* when a member of a governmental body "conspires to circumvent this chapter," it is at least as narrowly tailored as the TOMA provisions that Defendants admit are constitutional, *cf.* Doyal Br. 30 (admitting that section 551.144 is narrowly tailored); *id.* at xi ("Doyal is not asking this Court to strike down an entire Act of the Legislature."). After all, if prohibiting closed meetings is narrowly tailored to serve a compelling interest, as Defendants concede, a provision preventing officials from knowingly circumventing that requirement must also be narrowly tailored to serve a compelling interest.

III. Section 551.143 is Neither Overbroad Nor Void for Vagueness.

A. There is No Overbreadth Problem.

The overbreadth doctrine is "strong medicine" that should be applied "sparingly and only as a last resort," *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), when the challenging party has affirmatively demonstrated "from the text of [the law] *and from actual fact*" that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," *Stevens*, 559 U.S. at 485 (internal quotation marks omitted). Defendants cannot and have not met this high burden.

The "plainly legitimate sweep" of section 551.143 is considerable, as it merely prevents members of a governmental body from knowingly circumventing TOMA's requirement that deliberations must be conducted openly before the public. Put differently, like section 551.144, which *Asgeirsson* held not to be overbroad, section

551.143 does not prevent *any* speech, much less constitutionally protected speech. *See Asgeirsson*, 696 F.3d at 465 (there is "no support for the proposition that government officials have a constitutional right to discuss public policy among a quorum of their governing body in private"). Defendants argue that section 551.143 "chills" speech, *see, e.g.*, Doyal Br. at 42, but this "chilling" is simply the statute achieving the State's compelling interests by forcing officials to deliberate in public.

The only way Defendants can even attempt to demonstrate an unconstitutional application is to wholly ignore section 551.143's limited scope. But "the first step in overbreadth analysis is to construe the challenged statute" because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Stevens*, 559 U.S. at 474 (internal quotation marks and brackets omitted). Here, the touchstone is whether officials have "knowingly conspired to circumvent" TOMA. If they have not, there is no liability. It is telling then, that although Defendants proffered purportedly troubling hypotheticals below, *see e.g.*, Doyal Brief at 33 (Tex. App.—Beaumont) (Aug. 21, 2017) (arguing that the law could "criminalize public officials who have been approached by a citizen, asked to support a bill, and told that a fellow official has already done so"), they do not raise those hypotheticals again. In any event, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). "[T]here must be a *realistic* danger that the statute itself will *significantly* compromise recognized First Amendment protections of parties not before the Court." *Id.* at 801 (emphasis added). That has not been—and cannot be—established.

B. Section 551.143 is Not Void for Vagueness.

Defendants attempt to transform hypothetical statutory interpretation into vagueness problems. If, however, it is "clear what the [statute] as a whole prohibits," it will not be declared unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). This is because the Constitution does not require "perfect clarity and precise guidance," even when the statute "restrict[s] expressive activity." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).[7]

It is clear what section 551.143 "prohibits as a whole." It prohibits members of a government body from secretly meeting in a walking quorum to circumvent TOMA's disclosure requirements. *See supra* at 4-7. Defendants do not even offer a different interpretation. Even assuming that the statute here is somewhat muddled on first reading, a "statute which is arguably vague may be given constitutional clarity when aided by the standard rules of statutory construction." *Floyd v. State*, 575 S.W.2d 21, 23 (Tex. Crim. App. 1978). That is what the court of appeals did by interpreting the statute in its most natural way.

Defendants' real contention is that section 551.143 leaves "essential" questions unanswered. Doyal Br. 10 n.7. For example, does "deliberation" include discussing an item without making any commitments? Does "circumvent" mean avoid or does it mean violate? But even assuming these questions are left open, they do not raise any vagueness concerns. Courts routinely construe criminal provisions to determine

[7] Defendants seem to suggest that the vagueness doctrine applies with special force to laws involving speech by public officials. Doyal Br. 36. They cite no precedent for this remarkable contention that would provide more constitutional protection to individuals in positions of authority and less protection to ordinary citizens.

their precise bounds. Vagueness, by contrast, applies only to those rare statutes with unresolvable indeterminacy. That is why the Supreme Court of the United States has "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings"—but upheld laws that, once properly construed, present reasonably constrained yes-or-no questions to juries. *United States v. Williams*, 553 U.S. 285, 306 (2008); *see also Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015) (provision requiring courts to "apply an imprecise 'serious potential risk' standard . . . to a judge imagined abstraction" was unconstitutionally vague).

Here, there is no unconstitutionally vague or indeterminate phrase, only terms that may need to be construed in the future to determine the precise bounds of section 551.143's reach. Of course, construing these terms may be difficult. But that does not render them vague. *See Asgeirsson*, 696 F.3d at 466-67 (rejecting vagueness challenge that arose "from TOMA's complexity rather than its vagueness or lack of standards"). The ordinary person, reading section 551.143 in context and in the only way it can plausibly be read, would understand what conduct it prohibits on a whole. All other questions are at the margins and can be taken up as necessary by the courts.

Prayer

The Court should affirm the court of appeals, which reversed the trial court's order dismissing the indictments.

Respectfully submitted.

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Certificate of Service

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